No. 76-1026

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In the Supreme Court of the United States

OCTOBER TERM, 1976

FEDERATED PUBLICATIONS, INC., D/B/A
THE STATE JOURNAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is reported at 544 F. 2d 908. The decision and order of the National Labor Relations Board is reported at 218 N.L.R.B. ~~No.~~ 151.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1976, and the petition for a writ of certiorari was filed on January 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a bargaining order was an appropriate remedy for the unfair labor practices found in this case.

2. Whether the Board properly excluded certain part-time employees from a bargaining unit.

3. Whether cards signed by employees authorizing the union to represent them were misleading.

STATUTE INVOLVED

Sections 2(3) and 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 152(3), and 158(a)(1) and (3), are set forth in the petition (Pet. 2-3).

STATEMENT

The National Labor Relations Board found that petitioner, which publishes a newspaper, the State Journal, in Lansing, Michigan, engaged in unfair labor practices in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by discharging 21 contract haulers[1] because they sought representation by Teamsters Local Union No. 580 (the Union) (Pet. App. A19). In so holding, the Board found that the contract haulers were employees within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3), rather than independent contractors, as petitioner had urged (Pet. App. A20—A22).

The Board ordered petitioner to reinstate the unlawfully discharged drivers with backpay (Pet. App. A25, A26-A27). In addition, on the basis of its findings that the Union had obtained valid authorization cards from a majority of the haulers in an appropriate unit (Pet. App. A23) and that petitioner's unfair labor practices "have prevented the holding of a free and fair election" (Pet. App. A22), the Board issued a bargaining order requiring petitioner upon request to bargain with the Union as the exclusive representative of the employees in the applicable unit (Pet. App. A22, A25).

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[1]The contract haulers make bulk deliveries from the newspaper plant to various designated carrier drops and substations (Pet. App. A11).

The court of appeals, in a *per curiam* opinion (Pet. App. A1-A2), upheld the Board's decision and granted enforcement of its order pursuant to Section 10(e) of the Act, 29 U.S.C. 160(e). The court concluded that there was substantial evidence on the record as a whole to support the Board's conclusions that the contract haulers were employees rather than independent contractors and therefore protected by the Act, that the company had violated Sections 8(a)(1) and (3) of the Act, and that a bargaining order was an appropriate remedy. It also upheld the Board's determination as to the appropriate bargaining unit.

ARGUMENT

Petitioner's contentions deal primarily with the adequacy of the evidence in this case to support the Board's decision and order, and do not warrant review by this Court.

1. Petitioner does not challenge the Board's determination that the contract drivers were employees (Pet. 12) or that its discharge of these employees immediately after they selected the Union as their bargaining agent (Pet. App. A13-A14) constituted an unfair labor practice. Petitioner contends (Pet. 12-14), however, that a bargaining order was not an appropriate remedy under the standards established by this Court in *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575. *Gissel* approved the practice of issuing a bargaining order to an employer, rather than permitting it to insist on holding of secret ballot elections, if the employer has engaged in practices that have "the tendency to undermine majority strength and impede the election processes * * * where there is also a showing that at one point the union had a majority * * *." 395 U.S. at 614.

Petitioner asserts that, because it acted in the belief that the employees were independent contractors and because it offered to reinstate the employees three months

after discharging them, there is no showing that it had impeded the election process (Pet. 12-13).

Whatever petitioner's assessment of its legal rights may have been, the fact remains that the message communicated to employees was that petitioner was so hostile to dealing with them through a union that it preferred to fire them all, rather than even explore whether they were employees entitled to union representation. Such hostility clearly warranted the Board's conclusion (Pet. App. A22-A24) that petitioner's unfair labor practices had "prevented the holding of a free and fair election" and that a bargaining order was appropriate.[2]

2. Petitioner argues (Pet. 9-12) that the Board arbitrarily excluded two part-time employees from the bargaining unit. This contention raises only an evidentiary issue that does not warrant review by this Court. In any event, the record here amply supports the Board's finding as to the proper composition of the unit.

The test for including part-time employees in a bargaining unit is whether they share a community of interest with full-time employees as shown by "work[ing] at regularly assigned hours a substantial number of hours each week, perform[ing] duties similar to those of full-time employees, and shar[ing] the same supervision, working conditions, wages and fringe benefits." *Westchester Plastics of Ohio, Inc.* v. *National Labor Relations Board*, 401 F. 2d 903, 907-908 (C.A. 6).

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[2]As this Court has observed, "[i]t is for the Board and not the courts * * * to make [the determination that a bargaining order is appropriate], based on its expert estimate as to the effects on the election process of unfair labor practices of varying intensity. In fashioning its remedies under the [Act] * * * the Board draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts." *National Labor Relations Board* v. *Gissel Packing Co., supra*, 395 U.S. at 612, n. 32.

The four substitute drivers who were included in the bargaining unit—Iverson, McKanna, Rutledge, and Kaiser—worked regularly in place of a full-time driver one or two days a week (see Pet. App. A23, n. 24). When so employed, they were expected to follow the same detailed delivery instructions from the Company and work the assigned route exactly as would the regular driver. While their compensation was a matter for negotiation with the regular drivers whom they replaced, it was necessarily directly influenced by the regular drivers' rate of pay (A. 274-276, 411-412, 504-505).[3]

The other two part-time employees sought to be included by petitioner (Pet. 11) did not have the same substantial and continuing interest in the wages, hours and working conditions of the full-time employees. One of the two, driver Weismiller's wife, several times a week picked up her husband's papers and delivered "possibly [about] one-fourth of [his] route" before he replaced her and completed the delivery (A. 531). She was paid nothing for her work (A. 533). Driver Cummins' 15-year old grandson, although he regularly accompanied Cummins, only "assisted" him with the deliveries, and was paid one-third of Cummins' pay rate (A. 568-569). These two individuals did not share the same supervision as the four included substitutes, since their primary relationship was with the full-time driver whom they assisted, rather than the Company. Further, they did not share the four substitutes' interest in the rate of compensation to be established by collective bargaining. Cummins' grandson's pay depended on Cummins' apportionment of his pay, and Weismiller's wife received no compensation. Finally, their job responsibilities, since they

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[3]"A." refers to the Appendix to the briefs in the court below, a copy of which has been lodged with this Court.

were only "helpers," were significantly different from those of the four substitutes. They were therefore properly excluded from the bargaining unit.

3. Petitioner contends (Pet. 6-9) that the authorization cards signed by the employees led the employees to believe that they were authorizing only an election, and that therefore the cards should not be used as evidence that the Union was designated as their representative.

This contention was not raised before the Board. Section 10(e) of the Act, 29 U.S.C. 160(e), provides that a court of appeals, acting on a petition by the Board for enforcement of its order, shall not consider any "objection that has not been urged before the Board, its member, agent or agency * * * unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner alleges no extraordinary circumstances. The court of appeals therefore could not have considered the contention had petitioner sought to raise it in that court. *National Labor Relations Board* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322; *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255-256. *A fortiori*, petitioner should also be precluded from raising the issue for the first time in this Court, as it seeks to do. Indeed, even in the absence of a statute such as Section 10(e), petitioner would normally not be permitted to raise the issue now for the first time, *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330, particularly since it requires a factual determination that the cards at issue were misleading. See, *e.g.*, *National Labor Relations Board* v. *C. J. Glasgow Co.*, 356 F. 2d 476, 478 (C.A. 2); *Happach* v. *National Labor Relations Board*, 353 F. 2d 629, 631 (C.A. 7).

In any event, petitioner has not shown that the authorization cards were misleading.[4] They did not state that only an election to determine representation was authorized. Rather, they clearly granted authority both to represent and negotiate, in addition to referring broadly to authority to hold "elections."[5]

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[4]Petitioner relies on Mr. Justice Stewart's dissenting opinion in *Linden Lumber Division, Summer & Co.* v. *National Labor Relations Board*, 419 U.S. 301, 310, 314-315, n. 5, for the view that signing of cards by a bare majority of employees in this case should not be taken as evidence that the union is their authorized representative. That case, however, did not involve unfair labor practices that interfered with the conduct of an election, and therefore the language upon which petitioner relies does not address the appropriate use of authorization cards where an election is not a reliable method of determining employee preference.

[5]The cards authorized the union "to represent me and, in my behalf, to hold elections, negotiate all agreements as to hours of labor, wages, and other employment conditions" (Pet. App. A23, n. 23).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1977.

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*The Solicitor General is disqualified in this case.